Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

October Term, 1996

KEVIN ORTON

Petitioner,

vs.

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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89 pp

QUESTIONS PRESENTED

1. Can the Court of Appeals assume a factual basis for the enforcement of a Government administrative subpoena against a private citizen in the absence of an actual factual showing of relevancy as required under *United States v. Powell*, 379 U.S. 48 (1964), and as otherwise required by the Constitution?

2. Can the Court of Appeals, absent the existence of any relevant evidentiary matter, affirm the enforcement of a Government administrative subpoena on a theory of relevancy which was put forth by the Government for the first time on appeal?

3. If the scope of the Government's subpoena is broader than the parameters of the Government's constitutional relevancy argument, is the court below necessarily required to refuse to enforce the subpoena or, at least, restrict the enforcement thereof to documents which are reasonably understood to be within the parameters of the inquiry upon which such court bases its Constitutional relevancy determination?

4. Can an SEC administrative subpoena be enforced, based upon the possible relevancy of the documents and information called for by the subpoena to the burden of proof which the Government would be required to satisfy in order to obtain certain kind of statutory relief directed against a possible future violation of the law being investigated, prior to any determination that such law has been violated and without any showing that the documents called by the subpoena are relevant to the subject matter of the violation being investigated, whether it be conduct covered by the SEC's Private Order Of Investigation constituting a past violation or an impending actual threat of violation, as opposed to the type of relief which might later be sought by the SEC if a civil enforcement action is ultimately authorized and is in fact filed?

5. If the Government is allowed to base its subpoena on a possible unspecified future violation of law, without having first established the relevancy of the documents sought by the subpoena to any current or reasonably anticipated violation of law, what meaningful protection is afforded by the Fourth Amendment's prohibition against unreasonable search and seizure?

LIST OF PARTIES

All parties appear in the caption of the case as submitted on the facing page of this Petition. Appellee/ Respondent, the SEC, is an agency of the United States of America.

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and Securities Exchange Act of 1934,
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Petitioner respectfully prays that a writ of certiorari issue to review the order and judgment below.

OPINIONS BELOW

- The Order and Judgment of the United States Court Of Appeals For The Tenth Circuit (before Brorby, Ebel and Henry, Circuit Judges). The Court of Appeals' Order and Judgment dated November 6, 1996, appears as Appendix A to this petition.

- The Order of the United States Court Of Appeals For The Tenth Circuit filed January 21, 1997 denying Appellant's request for rehearing en banc. The Court of Appeals' Order appears as Appendix B to his Petition.

- The decision of the United States District Court (Tena Campbell, District Judge, Presiding). The District Court's Order Compelling Respondent Orton To Comply With Administrative Subpoena dated February 8, 1996, appears at Appendix C to this petition.

JURISDICTION

The date on which the United States Court of Appeals for the Tenth Circuit issued its Order and Judgment, and the

date on which such Judgment was entered by the Court, was November 6, 1996. A request and petition for en banc hearing before the Tenth Circuit Court of Appeals was filed by the Appellant on December 24, 1996; and was denied by the Court on January 21, 1997.

The jurisdiction of this Supreme Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution Of The United States Of America,
Amendment IV - Searches and Seizures

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

Section 19(b) of the Securities
Act of 1933, 15 U.S.C. §77r(b)[1]

> "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will

[1] The language of Section 21(d)(1) of the Securities Exchange Act of 1934 is substantially similar to the parallel provision in Section 19(b) of the Securities Act of 1933.

constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond".

STATEMENT OF THE CASE

In 1992, the Staff of the United States Securities and Exchange Commission (the "SEC" or the "Commission") reported to the Commission that it had information tending to show that during the period from September 1989 through January 1992 PanWorld Minerals International, Inc. ("PanWorld") violated the anti-fraud and registration provisions of the federal securities laws by, among other things, making false or misleading statements regarding its business activities and financial matters and by offering to sell or having sold shares of stock of PanWorld without proper registration of such securities with the SEC and without exemption from such registration requirement. The Commission issued a formal

order of investigation concerning PanWorld dated January 7, 1992 authorizing a private investigation to determine whether PanWorld had or was about to engage in any of the acts and practices set forth in the investigation order or acts or practices similar thereto which the SEC Staff had reported to the Commission represented possible violations of anti-fraud and registration provisions of the federal securities law administered by the SEC (the "Investigation Authorization"). (Appendix G, submitted under seal).[2] The scope of the investigation (and the SEC Staff's subpoena power relating thereto) is defined in and by the Investigation Authorization. At the time of the Investigation Authorization, PanWorld's 1989 and 1990 audited (calendar) year-end financial statements were on file with the SEC. Kevin Orton, including his independent accounting and auditing firm doing business as Orton & Company ("Orton"), did not audit and was not otherwise involved with the preparation of PanWorld's 1989 and 1990 year-end financial statements, and Orton was not otherwise involved in any way with PanWorld. During the course of the investigation, PanWorld filed with the SEC its audited 1991, 1992 and 1993

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[2] The SEC's Formal Order Of Investigation has been lodged with the Clerk of this Court under seal to preserve and maintain the SEC's position that such Investigation Authorization is a non-public, confidential communication/document.

year-end financial statements. None of such financial statements were audited by Orton, and Orton was not otherwise involved with PanWorld during the periods covered by such financial statements. In 1995, Orton was engaged to audit PanWorld's 1994 year-end financial statement. This was the first time that Orton had any involvement with PanWorld. PanWorld's 1994 audited year-end financial statements were filed with the SEC and otherwise publicly disseminated on or about July 10, 1995, as part of PanWorld's 1994 Annual Report to the SEC on Form 10-KSB. Orton's audit report and opinion on PanWorld's 1994 year-end financial statements was included in such 10-K Report. The SEC Staff had still not yet concluded the investigation previously approved by the Commission in January of 1992 when PanWorld's 1994 year-end financial statements were issued and filed with the SEC in July of 1995. The Commission's Investigation Authorization had never been amended to cover any activities by PanWorld following the issuance of such Order. The SEC Staff never issued any subpoena or otherwise attempted to obtain from PanWorld any documents or other information relating to PanWorld's 1994 year-end financial statements. The assets reflected on PanWorld's 1994 year-end Balance Sheet were not the same as the assets reflected on PanWorld's 1989 or 1990 financial statement Balance Sheets. During the course of the

protracted investigation of PanWorld (now approximately three plus years old), the SEC Staff apparently became interested in PanWorld's 1994 year-end financial statements. On July 14, 1995, the SEC Staff issued an administrative subpoena to Orton requiring him to produce all of the audit work papers relating to his audit of PanWorld's 1994 financial statements and all other documents which he had which related to PanWorld. (Appendix F). Orton refused to comply with the subpoena absent a statement by the SEC Staff as to why they were requesting such documents and confirming that such documents were covered by the Commission's January 1992 Investigation Authorization (which the Staff refused to do). The Staff then applied to the District Court for an order compelling Orton's compliance with the SEC's Subpoena.

The District Court, based on the SEC's application and supporting Declaration of the SEC's representative Carleen Achuff dated January 10, 1996, issued an order to show cause as to why Orton should not be compelled to comply with the SEC's subpoena ("OSC"). For purposes of and at the hearing on the OSC, Orton maintained that the documents called for by the SEC's subpoena were not relevant to the subject matter of the investigation authorized by the Commission because such investigation related to activities of PanWorld during the 1989-1990 period, had nothing to do with PanWorld's 1994 financial

statements or the matters reflected therein and that Orton had no involvement with PanWorld at any time prior to 1995 when he was engaged to audit PanWorld's 1994 year-end financial statements. The SEC Staff's affidavit to the District Court, in support of the enforcement of the subpoena to Orton, made no effort to link-up the PanWorld documents covered by the subpoena and the matters which were the subject of the Staff's January 1992 request and the Commission resulting Investigation Authorization, except to say that,

> "The documents sought by the Commission from Orton . . . are relevant and material to the investigation because information received by the staff indicates that certain persons may have made misrepresentations in the financial statements of Pan World . . . Information obtained during the investigation indicates that Orton may have knowledge of these matters".[3]

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[3] The SEC's conclusion and self-serving statement, was not based upon any facts set forth in the SEC's supporting affidavit and is entirely "circular" in nature. The information the Staff sought to compel from Orton was indicated to be relevant and material to the investigation being conducted by the Staff into the matters which were the subject of the Investigation Authorization because certain other information received by the Staff indicated that someone might have violated the federal securities laws and other information received by the Staff indicated that Orton may have

(Appendix E, ¶16). The foregoing was the total evidentiary showing offered by the SEC in support of enforcement of the SEC Subpoena against Orton. At the hearing on the OSC, the SEC Staff acknowledged that they did not believe that any of the assets reflected on PanWorld's 1994 financial statements were the same as the assets reflected on PanWorld's 1989 and 1990 financial statements (or the 1992 year-end financial statements for that matter). (Appendix D, page 8D) ("I cannot think of assets that are currently on the 1994 financial statements that were also on the 1992 financials"). The Staff did, however, argue at the hearing that PanWorld acquired assets in exchange for stock in 1994 which was the same "methodology" that Pan World previously used in valuing assets acquired for stock. (Appendix D, page 15D).

Nevertheless, the District Court ordered Orton to comply with the SEC's subpoena in its entirety (the "Court Order") because, the Court said,

> "I am mindful of the broad investigative powers of the SEC. I am aware of the burden in order
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> to issue an injunction; that the Staff must show

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knowledge of certain matters. (Appendix E, ¶16 at page 6E). The SEC Staff never stated how the information requested by the subpoena was relevant to the subject matter of the investigation authorized by the Commission.

likelihood of future violations".[4]

(Appendix D, page 18D). Orton timely complied with the Court Order, then appealed such Order to the Tenth Circuit Court of Appeals.[5] As his appeal, Orton raised Fourth Amendment issues including "reasonable relevancy" (which the Court of Appeals stated in its Order and Judgment dated

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[4] The SEC's investigation authority is not so broad as to exceed constitutional limitations. *Federal Trade Comm'n v. America Tobacco Co.*, 264 U.S. 298, 305-06 (1924) ("Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to . . . direct fishing expeditions into private papers on the possibility that they may discover evidence of crime"). *In Re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1418 (D.C. Cir. 1994) (subpoena may not be used for the general purposes of uncovering "other wrongdoing, as yet unknown"). *Schwimmer v. United States*, 232 F.2d 855, 862 (8th Cir. 1956) (abstract hunt for possible wrongdoing in professional's practice constituted a general fishing expedition).

[5] Mr. Orton's production of the documents does not moot his appeal. *See Church of Scientology v. United States*, 506 U.S. 9, 13 n.6 (1992), holding a case such as this is not moot as the court has the power to order an agency to return or destroy any copies of subpoenaed materials it may have in its possession.

November 6, 1996 essentially asked if the District Court abused its discretion by ordering Orton to comply with the SEC's subpoena. (Appendix A, page 3D).[6]

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[6] The "Statement Of Issues Presented" in the Appellant's Opening Brief to the Tenth Circuit Court of Appeals were, as follows: (1) Was there any evidentiary submission by the SEC to support a finding and conclusion by the Court that PanWorld's 1994 year-end audited financial statements, and the auditor's workpapers and other records and files in respect thereof, had any relationship to the activities which were the subject of the SEC's Formal Order Of Investigation dated January 17, 1992 covering PanWorld's 1990 year-end financial statements and activities during the period 1989-1992; (2) Was there even an argument made by the SEC which could have been the basis for any finding and conclusion by the Court that the subject matter of the Respondent's audit file on PanWorld's 1994 year-end audited financial statements, which was the subject of the SEC's Subpoena to Orton & Company dated July 10, 1995, was related to the subject matter of the SEC's Formal Order Of Investigation pertaining to activities by PanWorld prior to January 17, 1992?; and (3) Is it proper for the Court to anticipate the filing of a civil injunctive action by the SEC and the basis therefor, and the SEC's burden under Section 21(d)(1) of the Securities Exchange Act of 1934 to demonstrate the likely continuation of the alleged violation giving rise to such action to be entitled to such injunctive relief against such unnamed defendant(s), to justify the compelled examination of private business records of a professional accountant and auditor which files and records had no relationship whatsoever with the subject matter of the investigation, authorized more than three years prior to the issuance of the Subpoena; and, if so, what is left of the traditional analysis accompanying judicial determinations in

The Tenth Circuit Court of Appeals affirmed the Court Order compelling Orton's compliance with the SEC's subpoena. (Appendix A). In determining that the documents covered by the SEC's subpoena were "reasonably relevant" to the subject matter of the Investigation Authorization, the Court of Appeals said that,

> "[b]ecause the Commission was concerned that in PanWorld's 1994 financial statements it was using the same inappropriate method of valuing assets as on the 1992 financial statements, the documents sought in the subpoena relate to an investigation of 'acts or practices of similar purport or object' to acts in 1992.[7] As a result,

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the constitutionally protected area of governmental search and seizure which has traditionally required a responsible presentation by the government of the relationship between the papers to be examined and the subject matter of the investigation in respect of which the subject subpoena has been authorized and issued?

[7] The Court of Appeals apparently believed, mistakenly, that PanWorld's calendar 1992 year-end financials were issued or otherwise filed with the SEC prior to the time of the Commission's January 1992 Investigation Authorization. As previously indicated, even PanWorld's 1991 year-end financial statements were not filed with the SEC until after the issuance of the Investigation Authorization dated January 17, 1992. (Appendix G, on file under seal with the Clerk of this Court).

> Mr. Orton's 1994 audit documents are reasonably relevant to an investigation the Commission has authority to conduct".

The Court of Appeals went on to say that,

> "[t]he documents are also relevant to the financial statement specifically mentioned in the 1992 order as one of the factors that affects whether injunctive relief is warranted is whether the misconduct is an isolated occurrence or recurrent.[8] The Supreme Court has held administrative agencies 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is

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[8] It is difficult to understand what the Court of Appeals is saying in the within quoted language because the Investigation Authorization (the SEC's Private Order of Investigation) does not specifically mention any year's financial statements or any "financial statements" for that matter. (Appendix G, filed under seal). The Investigation Authorization does refer to a Registration Statement on Form S-1 filed by PanWorld on August 30, 1991, and amended on December 30, 1991, and does state that "[f]rom on and after October 30, 1989, various disclosure documents, including Forms 10-K, 10-Q and 8-K were filed with the Commission for and on behalf of PanWorld". But there is no reference to any financial statements in the Investigation Authorization, specific or otherwise.

not.' *United States v. Powell*, 379, U.S. 48, 57 (1964) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1949))".

The Court of Appeals, concluding its analysis, stated that,

> "[the Investigation Authorization] commanded an investigation into both past and future violations - - 'have engaged, or are about to engage'. Mr. Orton's argument that the documents sought are not relevant to the investigation authorized fade in light of the plain language of the [Investigation Authorization]".

Orton filed a request for en banc hearing; which was denied on January 21, 1997. The within Petition For Writ Of Certiorari has been timely filed on April 21, 1997.

REASONS FOR GRANTING THE PETITION

The decision of the Tenth Circuit Court of Appeals substantially undermines the protection afforded by the Fourth Amendment against unreasonable Government search and

seizure. The Court of Appeals based its decision on this Court's decision in *United States v. Powell, supra*, and the erroneous conclusion that such case permits the use of the Government's subpoena power to obtain private papers without any evidentiary or other showing that the documents called for by the subpoena are reasonably related to the conduct authorized to be investigated - - as opposed to conduct that takes places several years later which can only be determined to be related to the activities which were the subject of the previously authorized investigation by judicially augmenting the scope and subject matter of the prior investigative order so as to create the relevancy upon which to sanction enforcement of the otherwise unenforceable subpoena. This Petition should be granted so that this Court can address the constitutional issues presented hereby and articulate the constitutional standard to be applied so as to ensure adequate protection of private citizens' papers from Government subpoena.

The Court of Appeals justified enforcement of the SEC's subpoena to Orton by "filling in the blanks" of the SEC's constitutionally required, but absent, demonstration of relevancy. The Investigation Authorization (the SEC's Formal Order of Investigation) did not reference financial statements or the acquisition of assets in exchange for stock. (The Investigation Authorization did reference "the proper method

of recording the value of the company's assets and stockholders' equity"). Equally disconcerting, is the fact that the 1992 financial statements, which the Court of Appeals used as a linch-pin between the subject matter of the Investigation Authorization and the 1994 financial statements, were not even in existence when in January of 1992 the Commission authorized the investigation sought to be used in 1995 to obtain documents relating to PanWorld's 1994 financial statements - - because the same methodology of valuing assets reflected in the 1992 financial statements was used to value assets in the 1994 financial assets. (Appendix A, page 4A).[9] There has never been any attempt, by the SEC or the Court of Appeals, to demonstrate how the 1992 year-end financial statements - - which were prepared, issued and filed with the SEC substantially subsequent to the issuance of the SEC's Investigation Authorization - - are relevant to the subject matter of the investigation. Since there was not specific

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[9] As previously indicated, the SEC Staff admitted during the hearing before the District Court that assets reflected on the 1994 financial statements were not the same assets as were reflected on the 1992 financial statements. There was no reference to PanWorld's 1989 and 1990 year-end financial statements which were in existence during the time period expressly referenced in the Investigation Authorization as the period during which the activities being investigated took place.

reference to any "financial statements" in the SEC's Investigation Authorization, it is unclear how any methodology of valuing assets for purposes of such 1992 financial statements transcends the activities which were the subject of the Investigation Authorization to the 1992 financial statements and then on to the 1994 financial statements issued and published three plus years after the issuance of the Investigation Authorization expressly indicated to cover activities in the 1989 to January 1992 time period. Nowhere is there any attempt, by the SEC and/or the Court of Appeals, to explain why such "method of recording the value of the Company's assets" does or may constitute a violation of the federal securities laws.[10]

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[10] The acquisition of assets in exchange for stock, which is what the SEC Staff mentioned during the hearing before the District Court, does not appear to be a "methodology" which in and of itself could possibly constitute a violation of the federal securities laws. If the SEC Staff wanted to investigate the method of valuing assets reflected on the 1994 financial statements (independent appraisal reports, etc.), they should have sought a revised and supplemented investigation authorization from the Commission. But the methodology of valuing assets reflected on the 1994 financial statements had nothing to do with the subject matter of the Investigation Authorization issued in January of 1992. No more than saying that the cash or check methods of paying PanWorld's bills in 1994 was the same methodology used to pay PanWorld's bills during the period covered by the Investigation. Any such argument is meaningless, especially in the context of "constitutional

Nowhere is there any attempt, by the SEC or the Court of Appeals to explain the connection between the activities, in 1989 through January 1992, which warranted the investigation which the Commission had authorized and the 1992 financial statements and/or the 1994 financial statements. The scope of the investigation, and the Staff's subpoena power relating thereto, is defined in the SEC Investigation Authorization. The "constitutional relevancy" link was never made, or even attempted to be made, in support of the enforcement of the SEC's subpoena to Orton.

Absent any record establishing constitutional relevancy, the Court of Appeals appears to have been willing to, in effect, supply one by adopting the SEC's "methodology" argument (as opposed to evidentiary showing) designed to establish a relationship between the 1992 financial statements (not in existence at the time of the issuance of the Investigation Authorization or otherwise referenced therein) and the 1994 financial statements. It is clear that the Court of Appeals' decision did not establish the required "constitutional relevancy" connection between the activities which took place during the 1989 - January 1992 time period, which the SEC Staff was authorized to investigate as constituting possible

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relevancy" and the attendant burden on the Government to demonstrate same.

violations of the federal securities laws, and the activities reflected by the 1994 financial statements issued in July of 1995, and Orton's audit work papers in respect thereof.

Equally, surprising is the Court of Appeals' reliance on this Court's decision in *United States v. Powell, supra*, for constitutional support and determination that activities surrounding the preparation and issuance in July of 1995 of PanWorld's 1994 financial statements were somehow related to the subject matter of the SEC's January 1992 Investigation Authorization as a result of the "have engaged, or are about to engage" language contained in the SEC's Investigation Authorization. (emphasis added). The Court of Appeals citation to and reliance upon *United States v. Powell* (and *United States v. Morton Salt Co.*) is certainly misplaced. This Court has never sanctioned the use of Government subpoena power to obtain private papers simply because the Government had a right to investigate possible violations of law (or wanted to confirm that no laws had been violated). For the Government to be entitled to obtain private papers through the use of its subpoena power, the Court has steadfastly enforced the Constitution's mandate that such Government search be reasonable - - a demonstration by the Government that the documents sought to be obtained pursuant to the subpoena were reasonably related to the actual or potential violations

which are being investigated following formal authorization by the Governmental entity lawfully empowered to conduct such investigation. The enforcement of the SEC's subpoena against Orton deviated from the constitutionally required standard as enunciated by this Court (and cannot be justified by reliance on this Court's decision in *United States v. Powell* as indicated by the Court of Appeals in its Order and Judgment).

The SEC's subpoena was actually enforced, and the production of the records was actually compelled and the records were actually obtained by the SEC, based upon the District Court's reliance and determination that the SEC was entitled to obtain such records under the January 1992 Investigation Authorization and resulting subpoena in order to assist the Government to prove the likelihood of future violations of the federal securities laws under Sections 21(d)(1) and 19(b) of, respectively, the Securities Exchange Act of 1934 and the Securities Act of 1993. 15 U.S.C. §§78t(d)(1), et al. and 77r(b), respectively. Such provisions of the federal securities laws provide, in pertinent part, that,

> "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of the

> subchapter, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond."

15 U.S.C. §77r(b)

The determination that the defendant has violated and is likely, unless enjoined, to again violate the federal securities laws, as required under the above referenced sections of the federal securities laws presumes that a basis for filing a civil enforcement action seeking, among other things, injunctive relief already exists. No such request by the SEC Staff was ever made, or was authorization ever given by the Commission, to initiate any kind of SEC civil enforcement against PanWorld (and/or Orton).

The District Court mistakenly used the "reasonable likelihood" requirement for injunctive relief, as provided for in Sections 21(d)(1) and 19(b) of the federal securities laws referenced above, as a basis to compel production by Orton of

documents called for by the SEC's investigative subpoena. The District Court used the possibility of the SEC's need for proof to obtain injunctive relief in a civil action not yet (and never) determined to be filed by the SEC against PanWorld to justify the compelled production of documents from Orton pursuant to the SEC's subpoena seeking information for use in the investigation of possible wrongdoing by PanWorld as generally described in the Investigation Authorization.

The result of such "leap frog" analysis and justification, is to completely emasculate the protection intended to be afforded by the Fourth Amendment to the Constitution. Under the District Court's analysis and order, the possibility of any unspecified future violation of the federal securities laws, "future" in this case being three plus years after the SEC authorized the investigation which gave rise to the subpoena power sought to be used and enforced against Orton is this case, justifies the Government's use of subpoena powers to seek to obtain possible evidence of such future violation without the need to first establish the relevancy of the subpoenaed documents to the subject matter of the investigation which had previously been authorized. Almost by definition, the basis for the District Court's decision to compel by Court Order enforcement of the subpoena establishes that the documents being sought through the SEC Subpoena were

not related to the subject matter of the Investigation Authorization.[11]

Burden of Proof

Under applicable case law in the Tenth Circuit (and as enunciated by this Court), to be entitled to have the District Court compel Orton's response to the SEC's subpoena, the SEC was required to make an evidentiary showing establishing the relationship between the documents sought to be obtained by the subpoena and the actual subject matter of the investigation which had been authorized as set forth in such Investigation Authorization. *SEC v. Blackfoot Bituminous, Inc.*, 822 F.2d 512, 515 (10th Cir.), *cert. denied*, 449 U.S. 955 (1990) (the Government has the initial burden of establishing that the documents called for by the subpoena are relevant to the investigation which is the subject of the order authorizing such investigation). Also see, *United States v. Powell*, *supra*, and *United States v. Morton Salt Co.*, *supra*. The SEC did not satisfy such constitutionally imposed burden and safeguard.

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[11] Similarly, if the Court of Appeals' "about to engage" rationale allows the Government to subpoena obtain documents on the basis of an Investigation Authorization issued over three years ago, then such "about to engage" rationale could logically be extended to an even further "unrelated" time period and activities taking place during such unconnected time period.

Scope of the Subpoena

On its face, the scope of the documents called for by the SEC's subpoena exceeds the only documents rationale the SEC Staff offered in support of judicial enforcement of the subpoena.[12] For example, the SEC never offered any explanation as to how PanWorld stockholder list, stock transfer records and Orton's billing records for accounting and auditing services performed for PanWorld were reasonably related to PanWorld's 1992 financial statements and/or the "methodology" for valuing assets acquired by PanWorld in exchange for stock or otherwise. (Appendix F, pages 4F, at ¶1, and 5F at ¶3).

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[12] At the hearing before the District Court, the Staff asserted that enforcement of the subpoena was necessary to obtain Orton's auditing workpapers which the Staff believed would reflect that PanWorld was "valuing assets that [it] acquired in exchange for preferred stock". (Appendix D, page 15D). In the Staff's argument to the Tenth Circuit on appeal, it was argued that Orton's auditing work papers covering PanWorld's 1994 financial statements would reflect an "inappropriate method of valuing assets as on the 1992 financial statements" which argument, without any evidentiary submission by the SEC, was adopted by the Court of Appeals as a basis for its decision. (Appendix A, page, 4A).

CONCLUSION

The spirit as well as the letter of the Fourth Amendment are jeopardized by the application of this Court's decision in *United States v. Powell* to uphold the use of the Government's administrative subpoena power given the facts and circumstances of this case. Having been presented with a record devoid of the constitutional relevancy required to enforce and affirm the enforcement of the SEC's subpoena in this case, both the District Court and the Court of Appeals for the Tenth Circuit were forced to base their decisions on either the relevancy of the subpoenaed documents (1) to the SEC's need for proof of continuing violations of the securities laws (reasonable likelihood of future violations) in order to obtain injunctive relief in an as yet unfiled civil enforcement action or to impending violations which had not taken place during the more than three year period following the issuance of the Investigation Authorization providing the basis for the subpoena but which the Court indicated "could be about" to take place or (2) on an artificially created bridge, in the form of PanWorld's 1992 financial statements, from the subject matter (activities and time period) of the Investigation Authorization to PanWorld's 1994 financial statements and the auditor's work papers relating thereto.

The SEC's subpoena was enforced without requiring the SEC Staff to demonstrate, through an evidentiary submission or otherwise, how the documents constituting Orton's private files and records created in 1995 pertaining to the audit of PanWorld's 1994 year-end financial statements were related to the activities which the Commission authorized to be investigated in January of 1992 pertaining to the 1989-1991 time period. The best argument, as opposed to evidence, the SEC Staff ever put forth was to claim that there was a "methodology" of valuing assets acquired by PanWorld in exchange for stock which was reflected in PanWorld's 1992 financial statements which, although the assets reflected on the 1992 and 1994 financial statements were entirely different, the Staff believed may have been used to value assets reflected on the 1994 financial statements. The SEC Staff never offered any explanation, however, as to how the method of valuing assets on PanWorld's 1992 financial statements - - issued and filed with the SEC approximately one and one-half years after the Commission issued the Investigative Authorization covering activities which occurred prior to the issuance of PanWorld's 1991 year-end financial statements - - had anything to do with PanWorld's 1994 year-end financial statements. The enforcement of the SEC's subpoena, and the compelling of the production of Orton's private papers, constituted a violation of

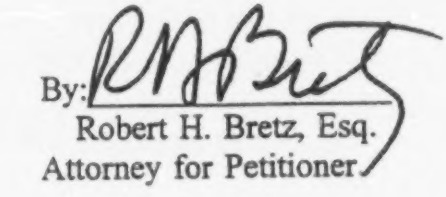
Orton's right under the Fourth Amendment to be free of unreasonable search and seizure by his Government. Accordingly Orton has every right, and this Court has every reason, to have the decisions of the District Court and the Tenth Circuit Court of Appeals reversed so that Orton's papers can and will be returned to him by the SEC.

For the foregoing reasons, the Court should grant the within petition for writ of certiorari.

Dated: April 21, 1997

Respectfully submitted,

ROBERT H. BRETZ, P.C.

By: 
Robert H. Bretz, Esq.
Attorney for Petitioner

PROOF OF SERVICE

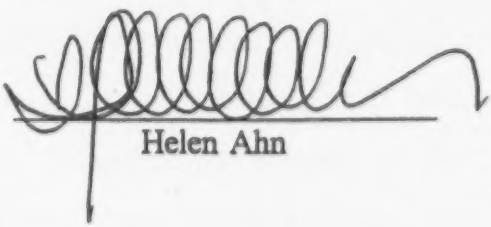
I, Helen Ahn, do declare that on this date, April 21, 1997, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR WRIT OF CERTIORARI (three copies each) on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above document in the United State mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed April 21, 1997



Helen Ahn

SERVICE LIST

Randall W. Quinn, Esq.
Jacob H. Stillman, Esq.
SECURITIES AND EXCHANGE COMMISSION
450 Fifth Street, N.W., Stop 6-6
Washington, D.C. 20549

The Honorable Janet Reno
Attorney General of the
United States of America
DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., NW, Rm 4400
Washington, D.C. 20530-0001

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION
Petitioner - Appellee,
vs.
KEVIN ORTON
Respondent - Appellant
ROGER GREER
Respondent.

No. 96-4052
(D.C. 96-CV-0041-C)

ORDER AND JUDGMENT*

FILED NOVEMBER 6, 1996

WADE BRORBY
UNITED STATES CIRCUIT JUDGE

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* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments, nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R.36.3.

Appeal from the United States District Court
Central District of Utah
Honorable Tena Campball, District Judge Presiding

Before BRORBY, EBEL and HENRY

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P.34(a); 10th Cir.34.1.9. The case is therefore ordered submitted without oral argument.

The district court entered an order compelling Mr. Orton to comply with an administrative subpoena duces tecum issued by the Securities and Exchange Commission. Mr. Orton appeals, and we affirm the order of the district court.

The significant facts are simple and uncontested. In 1992, the Commission staff reported to the Commission it had information tending to show that during the period September 1989 through January 1992, PanWorld Minerals International, Inc., violated the antifraud provisions of the federal securities laws by, among other things, filing financial statements with the Commission that falsely value the company's assets and fraudulently misstated its financial condition. The Commission in January 1992 issued a formal order of investigation concerning PanWorld Minerals International, Inc. During the course of the investigation, the Commission developed concerns about PanWorld's 1994 financial statements. In 1995, the Commission's staff issued a subpoena to Mr. Orton requiring him to produce his audit work papers and other documents relating to his audit of the 1994 financial statements. Mr. Orton did not comply with the subpoena. The Commission then applied to the district court for an order requiring compliance with the subpoena.

Mr. Orton argued to the district court that the Formal Order issued by the Commission authorized an investigation only of the events from 1989 through the issuance of the

order in 1992. Stated differently, Mr. Orton argued the documents sought (the work papers pertaining to the 1994 audit) were not relevant to the subject matter of the investigation authorized by the Commission's 1992 Formal Order. The district court disagreed with Mr. Orton and ordered compliance.

Mr. Orton complied with the order of the district court and then appealed from the district court's order, apparently seeking the return or the destruction of the documents.[1]

Mr. Orton raised three issues, which we restate simply by asking if the district court abused its discretion by ordering Mr. Orton to comply with the subpoena. *See Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

The record on appeal shows the Commission issued the subpoena pursuant to a Formal Order of Investigation, which authorized an investigation into, *inter alia*, possible securities fraud in connection with audited financial statements filed with the Commission. The Formal Order recited various acts and practices occurring between audited financial statements filed with the Commission. The Formal Order recited various acts and practices occurring between 1989 and 1992 as a basis for authorizing an investigation, and it authorized the Commission to investigate whether the company or any persons connected with it, or any other person "have engaged, or are about to engage, in any of the reported acts or practices or in any acts or practices of similar purport or object."

---

[1] Mr. Orton's production of the documents does not moot his appeal. *See Church of Scientology v. United States*, 506 U.S. 9, 13 n.6 (1992), holding a case such as this is not moot as the court has the power to order an agency to return or destroy any copies of subpoenaed materials it may have in its possession.

For the Commission's subpoenas to be judicially enforced, it must show its "inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met." *SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir.), *cert. denied*, 449 U.S. 955 (1980).

Mr. Orton challenges the subpoena on only one ground - - whether the documents are relevant to the subject matter of the investigation authorized by the Formal Order. We therefore ask whether the documents "are reasonably relevant" to its investigation.

Because the Commission was concerned that in PanWorld's 1994 financial statements it was using the same inappropriate method of valuing assets as on the 1992 financial statements, the documents sought in the subpoena relate to an investigation of "acts or practices of similar purport or object" to acts in 1992. As a result, Mr. Orton's 1994 audit documents are reasonably relevant to an investigation the Commission has authority to conduct. The documents are also relevant to the financial statement specifically mentioned in the 1992 order as one of the factors that affects whether injunctive relief is warranted is whether the misconduct is an isolated occurrence or recurrent. The Supreme Court has held that administrative agencies "'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'". *United States v. Powell*, 379 U.S. 48, 57 (1964) (quoting *United States v. Morton Salt Co.*, 338. U.S. 632, 642-43 (1949)).

Knowing the parameter of the legal analysis, we now look at the 1992 Formal Order. It commanded an investigation into both past and future violations - - "have engaged, or are about to engage." Mr. Orton's argument that the documents sought are not relevant to the investigation authorized fade in the light of the plain language of the Formal Order.

The judgment of the district court is **AFFIRMED**.

Entered for the Court

WADE BRORBY
United States Circuit Judge

APPENDIX B

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION
Petitioner - Appellee,
vs.
KEVIN ORTON
Respondent - Appellant
ROGER GREER
Respondent.

No. 96-4052

ORDER

FILED JANUARY 21, 1997

PATRICK FISHER, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
Central District of Utah
Honorable Tena Campball, District Judge Presiding

Before BRORBY, EBEL and HENRY

Respondent, Kevin Orton's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active

service as required by Fed.R.App.P.35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by: /s/
Deputy Clerk

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION
Applicant,
vs.
KEVIN ORTON and ROGER GREER
Respondents.

D.C. 96-CV-0041-C

ORDER COMPELLING RESPONDENT ORTON TO COMPLY WITH ADMINISTRATIVE SUBPOENA

FILED FEBRUARY 9, 1996

Before the Honorable Tena Campball,
District Judge Presiding

The Securities and Exchange Commission ("Commission") seeks enforcement of a subpoena duces tecum issued by the Commission and served upon the Respondent Kevin Orton on July 20, 1995. A hearing on the Motion was held on February 8, 1996. Thomas M. Melton and Leslie J. Hendrickson appeared on behalf of the Applicant. Robert H. Bretz, Jr. appeared by telephone on behalf of the Respondent Kevin Orton.

Based on the application of the Securities and Exchange Commission, pursuant to Section 22(b) of the Securities Act of 1933 [15 U.S.C. §77v(b)], and Section 21(c) of the Securities and Exchange Act of 1934 [15 U.S.C. §78u(c)], to compel Respondent Kevin Orton to comply with subpoena duces tecum duly issued and served by the Commission upon Mr. Orton on July 20, 1995, and the pleadings filed by the parties and the arguments of counsel for both parties, it appears to the Court that: 1) the Commission's inquiry is being conducted pursuant to a lawfully authorized legitimate purpose; 2) the subpoena seeks information reasonably relevant to the investigation; 3) all administrative requirements have been satisfied; 4) the Court has personal jurisdiction over Mr. Orton; and 5) Mr. Orton's failure to comply with the subpoena is without good cause, it is hereby,

ORDERED that Mr. Orton shall comply fully with the subpoena issued to him by the Commission by producing by February 13, 1996 the documents requested in the subpoena duces tecum to the Securities and Exchange Commission, 1801 California Street, Suite 4800, Denver, Colorado 80202 and appearing for testimony on February 29, 1996 at 8:30 a.m. and continuing until such testimony is finished at the Salt Lake City District Office of the Securities and Exchange Commission, 50 South Main Street, Suite 500, Salt Lake City, Utah.

IT IS FURTHER ORDERED that this Order be served upon Mr. Orton or his counsel by representatives of the Commission by means reasonably designed to give prompt notice of this Order to Mr. Orton including mail, personal service, facsimile machine, commercial courier service, or special process server.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes necessary and appropriate to insure compliance with this order.

DATED:

/s/
UNITED STATES
DISTRICT COURT JUDGE

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION
Applicant,
vs.
KEVIN ORTON and ROGER GREER
Respondents.

D.C. 96-CV-0041-C

TRANSCRIPT OF SHOW OF CAUSE HEARING

EXECUTED JULY 14, 1995

HONORABLE TENA CAMPBELL
UNITED STATES DISTRICT JUDGE

SALT LAKE CITY, UTAH
FEBRUARY 9, 1996

APPEARANCES:

FOR THE APPLICANT:

SECURITIES AND EXCHANGE COMMISSION
BY: LESLIE J. HENDRICKSON, ESQ.
CARLEEN ACHUFF, ESQ.
1801 CALIFORNIA STREET, SUITE 4800
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(303) 391-6800

BY: THOMAS M. MELTON, ESQ.
50 SOUTH MAIN STREET, SUITE 500
SALT LAKE CITY, UTAH 84144
(801) 524-5796

FOR THE RESPONDENT ORTON:

BY: ROBERT H. BRETZ, ESQ.
520 WASHINGTON BLVD., #428
MARINA DEL REY, CALIFORNIA 90292
(310) 578-1957

BOYACK, ASHTON & JENKINS
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COURT REPORTER:

RAYMOND P. FENLON
350 SOUTH MAIN STREET, #100
SALT LAKE CITY, UTAH 84101
(801) 322-0702

PROCEEDINGS

FEBRUARY 9, 1996
9:25 A.M.

(THE FOLLOWING HEARING WAS HELD IN CHAMBERS WITH MR. BRETZ PARTICIPATING VIA TELEPHONE CONFERENCE CALL)

THE COURT: WE'RE HERE IN CHAMBERS IN THE MATTER OF THE SECURITIES AND EXCHANGE COMMISSION VERSUS KEVIN ORTON AND ROGER GREER. WE'RE MEETING IN CHAMBERS WITH TOM MELTON, LESLIE HENDRICKSON AND CARLEEN ACHUFF OF THE S.E.C., AND MR. WALLY BOYACK, WHO IS LOCAL COUNSEL FOR KEVIN ORTON.

THE REASON THAT WE'RE IN CHAMBERS IS BECAUSE ROBERT BRETZ FROM CALIFORNIA, WHO ALSO REPRESENTS MR. ORTON, HAS TOLD US THAT HE CAN'T BE HERE IN PERSON, AND WE'RE GOING TO HAVE TO ATTEMPT TO HAVE SOME SORT OF A CALL.

ALL RIGHT. YOU WANT TO GIVE IT A GO?

MR. BRETZ, THIS IS TENA CAMPBELL. CAN YOU HEAR ME?

MR. BRETZ: I CAN. GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING. WE'RE HERE ON THE RECORD IN MY CHAMBERS. PRESENT WITH ME, OF COURSE, IS THE REPORTER, MR. FENLON, AND MY CLERK, MR. WILSON. YOUR LOCAL COUNSEL, WALLACE BOYACK IS HERE. FOR THE

S.E.C. WE HAVE TOM MELTON. LESLIE HENDRICKSON AND CARLEEN --AM I SAYING IT RIGHT, ACHUFF?

MS ACHUFF: YES.

THE COURT: ACHUFF. AND THIS IS THE ORDER TO SHOW CAUSE, THE APPLICATION FOR THE ORDER TO SHOW CAUSE WHY MR. ORTON SHOULD NOT APPEAR TO GIVE TESTIMONY, PROVIDE DOCUMENTS PURSUANT TO THE SUBPOENA.

SO CAN YOU HEAR -- CAN YOU STILL HEAR ME?

MR. BRETZ: I DID, YOUR HONOR, AND I MADE NOTES. THANK YOU.

THE COURT: ALL RIGHT. IF AT ANYTIME YOU CAN'T HEAR -- IS IT GOING TO BE YOU SPEAKING, MR. MELTON?

MS. HENDRICKSON: IT WILL BE ME, YOUR HONOR.

THE COURT: OKAY. MS. HENDRICKSON, WHO IS GOING TO PRESENT THE ARGUMENT FOR THE S.E.C., PLEASE LET ME KNOW, ALL RIGHT?

MR. BRETZ: YES, YOUR HONOR.

THE COURT: ALL RIGHT. GO AHEAD, PLEASE.

MR. BRETZ: MAY I INQUIRE? WE HAD A LITTLE BIT OF DIFFICULTY IN GETTING OUR OPPOSITION PAPERS TO YOU, AND THE LAST TIME

I CHECKED WITH YOUR CLERK, HE WASN'T SURE THE S.E.C.'S REPLY BRIEF HAD BEEN RECEIVED. CAN YOU LET US KNOW WHAT PAPERS YOU'VE HAD THE CHANGE TO REVIEW?

THE COURT: I'VE HAD THEM ALL. WE'VE THIS MORNING LOOKED AT YOUR OPPOSITION AND THE S.E.C'S REPLY BRIEF, SO I THINK I'VE GOT THEM ALL.

MR. BRETZ: THANK YOU.

THE COURT: ALL RIGHT.

MS. HENDRICKSON: YOUR HONOR, THE SECURITIES AND EXCHANGE COMMISSION'S POSITION IS THAT WE HAVE MET AND MADE A PRIMA FACIE CASE FOR THE ENFORCEMENT OF THE SUBPOENA DUCES TECUM AGAINST KEVIN ORTON. THE STANDARD FOR ENFORCING AN ADMINISTRATIVE SUBPOENA IS SET OUT IN THE U.S. VERSUS POWELL, A SUPREME COURT CASE THAT DEALT WITH ENFORCEMENT OF AN I.R.S. SUBPOENA.

THE COURT: AND I AGREE. I'M JUST CONCERNED. AND I THINK THE MAJOR ISSUE IS BECAUSE OF THE DATES, THE ORDER HAVING BEEN -- THE FORMAL ORDER HAVING BEEN ISSUED IN '92, AND YOUR SUBPOENA DIRECTED TO MR. ORTON, WHO ONLY BECAME INVOLVED IN '95, AND ALTHOUGH THERE HAVE BEEN SUPPLEMENTS WHICH I REVIEWED THIS MORNING, THOSE SUPPLEMENTS DID NOT SEEM TO ADDRESS ANYTHING BUT APPOINTING ADDITIONAL OFFICERS TO DO THE INVESTIGATION.

SO I THINK THAT'S REALLY THE ISSUE THAT I'M MOST CONCERNED. HOW IS IT RELATED TO THE ORDER, YOUR SUBPOENA TO MR. ORTON?

MS HENDRICKSON: WHEN FORMAL ORDERS ARE ISSUED BY THE COMMISSION, IT'S PURSUANT TO STATUTORY SECTIONS 19(B) OF THE 1933 ACT AND SECTION 21(A) OF THE 1934 ACT. IN THOSE PROVISIONS THE COMMISSION IS GIVEN AUTHORITY TO SUBPOENA PEOPLE AND DOCUMENTS FOR PEOPLE WHO ARE VIOLATING -- OR HAVE VIOLATED, ARE VIOLATING OR ARE ABOUT TO VIOLATE THE FEDERAL SECURITY LAWS. THIS ALLOWS THE OFFICERS INVESTIGATING TO LOOK AT ACTIVITY THAT IS CURRENTLY GOING ON OR THAT MAY HAPPEN IN THE FUTURE. SO THAT CERTAINLY THE DATE OF THE FORMAL ORDER DOES NOT STOP OR PREVENT THE OFFICERS FROM CONTINUING TO LOOK AT ACTIVITY THAT IS ONGOING AND GOES BEYOND THE DATE OF THE FORMAL ORDER.

I DON'T KNOW HOW THE COMMISSION COULD INVESTIGATE CONTINUING ACTIVITY WITH THE OBLIGATIONS OF EVERY TIME SOMEONE NEW HAS ENTERED, HAVING TO UPDATE THE FORMAL ORDER. REALLY, IT'S JUST A DOCUMENT TO DEFINE GENERALLY THE PARAMETERS THAT THE OFFICER IS GOING TO LOOK AT.

I HAVE LOOKED FOR CASES THAT DEAL WITH THIS ISSUE ABOUT THE DATE OF THE FORMAL ORDER, AND I WAS UNABLE TO FIND ANY ON POINT, AND CERTAINLY MR. BRETZ HAS BEEN UNABLE TO CITE YOU TO ANY THAT STATE SPECIFICALLY THAT THE DATE OF THE FORMAL ORDER LIMITS THE OFFICER'S AUTHORITY.

THE ONLY CASE THAT I DID FIND THAT PERHAPS MAY BE HELPFUL AND WAS CITED IN OUR INITIAL CASE IS S.E.C. VERSUS BRIGADOON SCOTCH DISTRIBUTING COMPANY, 480 FED.2ND 1047. THIS IS A SECOND CIRCUIT CASE IN 1973.

IN THAT CASE THE FORMAL ORDER WAS ISSUED ON FEBRUARY 4TH, 1971, AND THE COMMISSION WAS SEEKING TO ENFORCE TWO SUBPOENAS, ONE THAT HAD BEEN ISSUED ON APRIL 14TH OR 1971 AND THE SECOND ISSUED ON JULY 9TH, 1971. BOTH SOUGHT FINANCIAL STATEMENTS AND BANK RECORDS FROM JANUARY 1968 TO DATE. SO CERTAINLY BOTH OF THOSE SUBPOENAS WERE SEEKING DOCUMENTS THAT WERE CREATED AFTER THE DATE OF THE FORMAL ORDER, AND IN FACT IN THAT CASE THE SUBPOENAS WERE ENFORCED.

IN TERMS OF GENERAL RELEVANCE, THE FORMAL ORDER ITSELF SPECIFICALLY ADVISES INDIVIDUALS THAT WE ARE SEEKING -- LET ME THINK OF THE RIGHT WORDS -- BASICALLY MISREPRESENTATIONS THAT OCCUR AS TO THE VALUATION OF THE ASSETS OF PANWORLD AND HOW THOSE VALUATIONS ARE REACHED WHICH IS EXACTLY WHAT AUDITED FINANCIAL STATEMENTS DEAL WITH.

SO IN TERMS OF THE GENERAL SCOPE OF THE FORMAL ORDER, IT SPECIFICALLY COVERS THE TYPES OF DOCUMENTS THAT MR. ORTON DEALS WITH. I THINK REALLY THE ONLY QUESTION OF RELEVANCE IS WHETHER OR NOT SOMEHOW THE DATE OF JANUARY 17TH, 1992 LIMITS THE STAFF'S AUTHORITY TO LOOK BEYOND THAT DATE. AND OUR POSITION IS THAT IT DOES NOT.

THE COURT: NOW, THE DOCUMENTS THAT YOU ARE SEEKING FROM MR. ORTON HAVE TO DO WITH HIS WORK PAPERS FOR THE AUDITED FINANCIALS FOR, WHAT, 1994 AND '95?

MS HENDRICKSON: NO, YOUR HONOR, JUST FOR 1994. AS FAR AS I KNOW, THAT IS THE ONLY AUDITED FINANCIALS THAT HE HAS PREPARED.

THE COURT: IS IT YOUR BELIEF THAT THE FINANCIAL CONDITION OF PANWORLD IN '94 MIGHT ALSO BE RELEVANT TO THE TRUE FINANCIAL CONDITION OF THE COMPANY IN 1992? IN OTHER WORDS, IF YOU SAW A VAST DISCREPANCY, IS IT POSSIBLE THAT WHAT YOU'RE SEEKING ABOUT THE FINANCIAL CONDITION IN '94 MIGHT ALSO SHED LIGHT ON THE TRUE CONDITION IN '92 AND EARLIER?

MS. HENDRICKSON: I'M TRYING TO THINK OF THE ASSETS THAT PANWORLD CURRENTLY CLAIMS AND INCLUDES IN ITS FINANCIALS AND WHETHER THOSE ASSETS THAT EXISTED IN 1992 CONTINUE TO EXIST IN 1994. AS FAR AS I CAN THINK, YOUR HONOR, I CANNOT THINK OF ASSETS THAT ARE CURRENTLY ON THE 1994 FINANCIALS THAT WERE ALSO IN THE 1992 FINANCIALS.

THE COURT: SO WHEN YOU SEEK -- WHEN YOU SEEK INFORMATION ABOUT THE FINANCIALS OF 1994, YOU ARE LOOKING SOLELY TO SEE WHETHER THERE MIGHT BE FRAUD AS OF THAT DATE, 1994, IS THAT CORRECT?

MS. HENDRICKSON: YES, YOUR HONOR. ALSO, WHENEVER WE BRING AN INJUNCTIVE

ACTION FOR VIOLATION OF THE FRAUD -- ANTIFRAUD PROVISIONS OF EITHER THE '33 OR THE '34 ACT, PART OF OUR BURDEN IS SHOWING LIKELIHOOD OF FUTURE VIOLATIONS. AND CERTAINLY IF WE LOOK AT THE CAPSULE 1992 AND BEFORE THAT, WE CAN SHOW HISTORICALLY WHAT HAPPENED, BUT TO SHOW THAT THERE IS CONTINUING CONDUCT IS PART OF OUR BURDEN IN SEEKING AN INJUNCTION. SO WE ALWAYS NEED TO LOOK AT THE CONTINUED ACTIVITIES OF THE PEOPLE THAT WE'RE INVESTIGATING.

THE COURT: WHAT ABOUT MR. BRETZ' CLAIM THAT THE INVESTIGATION ESSENTIALLY IS OVER IN THAT A RECOMMENDATION HAS ALREADY BEEN MADE?

MS. HENDRICKSON: YOUR HONOR, UNDER THE SUPREME COURT CASE SECURITIES AND EXCHANGE COMMISSION VERSUS JERRY T. O'BRIEN -- AND IT'S CITED IN OUR PLEADINGS -- THE COMMISSION HAS NO OBLIGATIONS TO INFORM MR. BRETZ OR HIS CLIENT ABOUT THE PROGRESS OF OUR INVESTIGATION; THAT THE COMMISSION HAS MADE THE DETERMINATION THAT ITS INVESTIGATIONS ARE GOING TO BE NONPUBLIC.

WHENEVER THE OFFICERS IN AN INVESTIGATION MAKE AND ENFORCEMENT RECOMMENDATION TO THE COMMISSION, THEY REVIEW IT, AND THEY CAN OFTTIMES SAY, "I DON'T LIKE THE CHARGES YOU'VE BROUGHT AGAINST THIS PERSON. I DON'T THINK YOU FACTUALLY HAVE ENOUGH INFORMATION TO SUPPORT THE CLAIMS THAT YOU'VE MADE. GO GATHER MORE INFORMATION." THEY DO NOT TYPICALLY, AT LEAST IN MY EXPERIENCE, THEN

ISSUE A NEW FORMAL ORDER TO CAUSE THE OFFICERS TO GO GATHER MORE INFORMATION.

SO THE MERE FACT THAT WE HAVE SUBMITTED A RECOMMENDATION AS TO PARTICULAR INDIVIDUALS DOES NOT STOP OUR AUTHORITY TO CONTINUE TO SUBPOENA INFORMATION AS TO OTHER INDIVIDUALS. AND I WOULD POINT YOUR HONOR TO THE COMMISSION'S RULES OF PRACTICE THAT DEAL WITH THEIR ADMINISTRATIVE PROCEEDINGS, WHICH WE'VE CITED IN OUR REPLY BRIEF, IN WHICH THERE IS A PROCEDURE WHEREBY THE ADMINISTRATIVE LAW JUDGE CAN OVERSEE INVESTIGATIVE SUBPOENAS THAT ARE ONGOING IN AN INVESTIGATION DEALING WITH OTHER INDIVIDUALS THAN THE RESPONDENTS THAT ARE NAMED IN THE ACTUAL ADMINISTRATIVE PROCEEDING THAT IS ONGOING.

SO CERTAINLY THE COMMISSION'S OWN RULES CONTEMPLATE THE IDEA THAT AN ACTION MAY ACTUALLY BE INSTITUTED IN AN ADMINISTRATIVE PROCEEDING AND ON ONGOING INVESTIGATION RELATING TO THE SAME CASE NAME, THE SAME FORMAL ORDER CAN BE ONGOING.

MR. MELTON: YOUR HONOR, IF I COULD JUST SUPPLEMENT FOR A MOMENT, IF I MAY.

THE COURT: SURE, MR. MELTON.

MR. MELTON: IT'S ALSO, I THINK, OUR EXPERIENCE AS AN ENFORCEMENT STAFF, MS. HENDRICKSON AND I, THAT OFTEN A RECOMMENDATION IS SUBMITTED WITH THE REQUEST THAT A CONTINUING -- THAT THE FORMAL ORDER BE CONTINUED PAST EVEN THE

INSTITUTION OF A CIVIL PROCEEDING. THAT MAY BE, FOR INSTANCE, WHERE WE'VE IDENTIFIED SOME VIOLATIONS, BUT WE BELIEVE THAT THERE IS ONGOING CONDUCT THAT MAY BRING ADDITIONAL PARTIES.

AND SO THAT WHEN RECOMMENDATION MEMOS ARE SUBMITTED TO THE COMMISSION, AS MS. HENDRICKSON HAS POINTED OUT, WE OFTEN INCLUDE, AND I BELIEVE I'VE INCLUDED IN THIS INSTANCE, A REQUEST THAT THE COMMISSION CONTINUE THE FORMAL ORDER EVEN PAST THE INSTITUTION OF A CIVIL PROCEEDING IN THIS CASE.

THE COURT: ALL RIGHT. ANYTHING FURTHER BEFORE MR. BRETZ OR MR. BOYACK, WHOMEVER, SPEAKS? MS. HENDRICKSON OR MR. MELTON?

MS. HENDRICKSON: NO, YOUR HONOR.

THE COURT: ALL RIGHT, MR. BRETZ, GO AHEAD, PLEASE.

MR. BRETZ: THANK YOU, YOUR HONOR. IT SEEMS TO ME IF I CAN ADDRESS THE LAST POINTS THE COURT RAISED. I'M NOT SURE WE GOT AN ANSWER. WE'RE NOT CHALLENGING THE COMMISSION'S RIGHT TO WITHHOLD FROM US THE STATUS OF THE INVESTIGATION. WE'RE SAYING THAT IF YOU CHOOSE TO DO THAT, AND THE INVESTIGATION HAS BEEN CONCLUDED, IT US UNFAIR FOR THEM TO COME INTO YOUR COURTROOM AND ASK YOU TO ENFORCE AN ADMINISTRATIVE SUBPOENA BASED ON THE

ASSUMPTION THAT THE INVESTIGATION IS ONGOING.

SO, ONCE AGAIN, IF THEY CHOOSE NOT TO TELL US WHETHER THE INVESTIGATION IS OVER OR NOT, WE'RE NOT CHALLENGING THAT. WHAT WE'RE SAYING THOUGH IS IT'S UNFAIR FOR THEM TO COME IN AND TRY AND ENFORCE A SUBPOENA ON THE PRESUMPTION THAT THE INVESTIGATION IS ONGOING IF IT IS NOT. AND MR. MELTON'S POINT ABOUT WHAT THEY OFTENTIMES DO REGARDING THEIR ABILITY TO KEEP AN INVESTIGATION GOING, EVEN THOUGH THEY'VE MADE AN ENFORCEMENT RECOMMENDATION, WE HAVE NO EVIDENTIARY SUBMISSION OF - - ABOUT THAT IN THIS CASE.

IF IN FACT THEY WANT TO REPORT TO THE COURT THAT THE ENFORCEMENT RECOMMENDATION HAS GONE FORWARD, BUT IT ASKS THAT THE INVESTIGATION BE ONGOING AND CONTINUING, THEN I WOULD UNDERSTAND THE RECORD IN RESPECT OF WHICH WE NEED TO ARGUE TO THE COURT TODAY. BUT THEY HAVEN'T DONE EITHER OF THOSE TWO THINGS, SO TO ME THEY - - I'M NOT SURE THAT THEY REALLY ANSWERED THE COURT'S QUESTIONS, AND THAT'S WHETHER OR NOT IF THE INVESTIGATION IS TRULY OVER AND YOU'VE MADE YOUR ENFORCEMENT RECOMMENDATION, ISN'T IT TIME TO CEASE TRYING TO ENFORCE YOUR ADMINISTRATIVE SUBPOENAS, GET YOUR AUTHORITY TO SUE, COME INTO FEDERAL COURT AND START YOUR DISCOVERY?

NOW, IF I MAY GO BACK TO THE MAIN POINT. IT SEEMS TO ME THE COMMISSION HAS ADMITTED FOR THE RECORD THAT THERE IS NO RELEVANCY AS TO THE INFORMATION THEY BELIEVE MR. ORTON HAS AS TO WHAT I'LL CALL THE OLD

SUBJECT MATTER OF THE FRAUD. AND, YOUR HONOR, THE S.E.C. OF COURSE HAS THE SUBJECT 1994 FINANCIAL STATEMENTS.

CONTRARY TO THE ARGUMENT IN THE PAPERS, MR. ORTON DOESN'T PREPARE THOSE FINANCIAL STATEMENTS. HE AUDITS THEM AND HE REPORTS ON THEM. SO WHAT THE STAFF HAS IS THE '94 FINANCIAL STATEMENT OF PANWORLD AND MR. ORTON'S COMPANY'S AUDIT REPORT, AND IT WOULD HAVE BEEN VERY EASY FOR THEM TO GO TO A CATEGORY OF ASSETS IN 1994 AND COME TO THIS COURT AND SAY "THIS CATEGORY OF ASSETS IS STILL ON THE BALANCE SHEET, AND THEREFORE IT IS RELEVANT THAT WE LOOK AND SEE INTO MR. ORTON'S WORK PAPERS THE VALUATION PROCESS THAT WAS USED TO SUBSTANTIATE THE VALUE OF THOSE ASSETS BECAUSE IT HAS SOME RELEVANCY TO THE CARRYING VALUE OF THOSE ASSETS IN 1991 AND 1992."

BUT TO HER CREDIT, MS. HENDRICKSON DID NOT SUGGEST THAT WAS THE CASE BECAUSE I AGREE WITH HER. I DON'T BELIEVE THERE ARE ANY SUCH CATEGORIES OF ASSETS. AND THE - - WE'RE REALLY NOT ARGUING THAT THE COMMISSION HAS TO GO BACK AND GET A NEW FORMAL ORDER OR AN AMENDED FORMAL ORDER. IF THEY WANT TO INVESTIGATE FACTS THAT ARE - -THAT TOOK PLACE AFTER THE DATE OF THEIR FIRST FORMAL ORDER, IF IN FACT THERE'S RELEVANCY TO THE EXTENT THAT - - AND HERE THE PERIOD OF TIME WAS SO LARGE IT SEEMED TO AUGER AGAINST RELEVANCY.

AND AS I SAY, I BELIEVE WE'VE HAD A CONCESSION THAT THERE IS NO RELEVANCY. IF THAT'S TRUE, WHERE DOES THAT LEAVE US? IT

SEEMS TO ME THAT IF THE COMMISSION HAS ANY REASON TO BELIEVE THAT THE 1994 FINANCIAL STATEMENTS AND/OR MR. ORTON'S PROFESSIONAL INVOLVEMENT IN THAT CATEGORY OF ASSETS AND TIME PERIOD SUGGESTS ANY KIND OF A VIOLATION, THAT THE COMMISSION'S OWN RULES TELL THEM WHAT THE STAFF SHOULD DO, AND THAT'S GO BACK, GET A FORMAL ORDER SO THAT WE CAN MAKE SURE THAT CONSTITUTIONAL PROTECTIONS ARE ABIDED BY.

THAT'S WHY WE HAVE THE FORMAL ORDER PROCESS IN THE FIRST PLACE. IT'S A RELATIVELY ROUTINE ADMINISTRATIVE TASK FOR THE STAFF. AND IT SEEMS TO ME THAT'S KIND OF THE SUBJECT MATTER OF THE '94 FINANCIAL STATEMENTS, THEN BOTH THE PASSAGE OF TIME AND THAT FACT SUGGESTS THEY SHOULDN'T BE TRYING TO USE THE OLD FORMAL ORDER TO DELVE INTO THESE PRIVATE PAPERS. AND THAT IF THEY HAVE ANY REASON TO BELIEVE THAT THERE'S A PROBLEM THREE OR FOUR YEARS LATER, THEY SHOULD GO BACK AND GET A NEW FORMAL ORDER INVESTIGATION.

AND THAT'S WHAT WE WOULD ASK THIS COURT TO ASK THEM TO DO. UNLESS THEY CAN SUPPLEMENT THEIR PAPERS AND MAKE SOME EVIDENTIARY SHOWING THAT IT'S NOT JUST THE FACT THAT THE SCOPE - - IT'S NOT JUST THE FACT THAT THE PAPERS THEY WANT TO INQUIRE INTO NOW ARE FAR DISTANT FROM THE SUBJECT - - FROM THE TIMING PARAMETERS OF THE FIRST FORMAL ORDER, BUT THAT THERE IS, AS THEY CONCEDE, NO RELATIONSHIP.

THE COURT: ALL RIGHT.

MR. BRETZ: MAYBE MY LOCAL COUNSEL COULD SUPPLEMENT IF HE THINKS WE'VE MISSED ANYTHING.

THE COURT: MR. BOYACK, ANYTHING?

MR. BOYACK: I DON'T HAVE ANYTHING TO ADD, YOUR HONOR.

THE COURT: MS. HENDRIKSON.

MS. HENDRIKSON: ONE OF THE MAIN CONCERNS IN LOOKING AT MR. ORTON'S AUDITED FINANCIAL STATEMENTS IS THAT HE IS VALUING ASSETS THAT PANWORLD ACQUIRED IN EXCHANGE FOR PREFERRED STOCK, AND THAT WE FEEL IN INAPPROPRIATE. IT MISREPRESENTS THE VALUES. THAT IS THE SAME METHODOLOGY THAT PANWORLD HAS USED IN ACQUIRING AND VALUING ALL OF ITS ASSETS.

LIKEWISE, IN HIS AUDIT LETTER HE STATES THAT THESE FINANCIAL STATEMENTS ARE THE REPRESENTATIONS OF ARE BASED ON THE REPRESENTATIONS OF THE MANAGEMENT OF THE COMPANY OF PANWORLD. CERTAINLY HE HAS RELEVANT INFORMATION ABOUT WHAT THEY ARE TELLING HIM AND WHETHER OR NOT THEY'RE MAKING MISREPRESENTATIONS TO HIM.

THE COURT: IS YOUR INVESTIGATION ONGOING?

MS. HENDRIKSON: YES, IT IS, YOUR HONOR.

THE COURT: ALL RIGHT. I'M GOING TO GRANT THE MOTION. AND IT APPEARS TO ME

THAT THE S.E.C. HAS COMPLIED WITH THE REQUIREMENTS FOR ENFORCEMENT OF THIS SUBPOENA. SO MR. ORTON IS ORDERED TO FULLY COMPLY WITH THE SUBPOENA ISSUED TO HIM BY THE S.E.C., AND IT WAS SERVED UPON HIM ON JULY 20TH, 1995, I BELIEVE.

AND ACCORDING TO THE ORDER HE IS TO PRODUCE THE DOCUMENTS REQUESTED IN THE SUBPOENA DUCES TECUM TO THE SECURITIES AND EXCHANGE COMMISSION, 1801 CALIFORNIA STREET, SUITE 4800, DENVER COLORADO 80202, AND IS TO APPEAR PERSONALLY FOR TESTIMONY ON FEBRUARY 29TH, 1996 AT 8:30 A.M., AND WILL CONTINUE UNTIL THE TESTIMONY IS FINISHED.

AND THAT IS TO BE - - THE APPEARANCE, I GATHER, IS REQUESTED TO BE AT THE SALT LAKE DISTRICT OFFICE OF THE S.E.C., 50 SOUTH MAIN STREET, SUITE 500, SALT LAKE CITY, UTAH, SO TO MAKE SURE THAT I UNDERSTAND, THE DOCUMENTS ARE TO BE PRODUCED IN DENVER, AM I RIGHT?

MS. HENDRIKSON: YES, YOUR HONOR.

THE COURT: AND BY WHAT DATE ARE - - THE 13TH RIGHT?

MS HENDRIKSON: WE WOULD LIKE THEM BY THE 13TH.

THE COURT: OKAY. FEBRUARY 13TH, MR. BRETZ, THE DOCUMENTS TO THE S.E.C., 1801 CALIFORNIA STREET, SUITE 4800, DENVER COLORADO 80202; AND YOUR CLIENT PERSONALLY HERE IN SALT LAKE AT THE S.E.C. FEBRUARY 29TH.

MR. BRETZ: MAY I SUPPLEMENT THE RECORD?

THE COURT: PARDON ME?

MR. BRETZ: MAY I SUPPLEMENT THE RECORD?

THE COURT: INDEED.

MR. BRETZ: THAT LAST STATEMENT BY COUNSEL, I DON'T KNOW IF THAT HAD ANY IMPORT ON THE COURT'S DECISION, BUT THE FACT THAT COMPANY ISSUES STOCK IN 1994 TO BUY ASSETS, IT WAS DETERMINED TO BE - - I THINK THE WORD WAS USED THE SAME METHODOLOGY - - THAT STILL DOESN'T ESTABLISH BY ANY EVIDENTIARY BASIS ANY RELATIONSHIP BETWEEN THE SUBJECT MATTER OF THE INVESTIGATION THAT WAS AUTHORIZED BY THE FIRST FORMAL ORDER AND WHAT THEY WANT TO DO NOW.

AND I'M WONDERING AND WOULD REQUEST TWO THINGS. DOES THE COURT BELIEVE THERE'S AN EVIDENTIARY BASIS SHOWING THAT THE INFORMATION THEY WANT TO OBTAIN BY SUBPOENA HAS ANY RELEVANCY TO THE SUBJECT MATTER IN FIRST INVESTIGATION, AND IF SO, WOULD THE COURT MAKE ANY KIND OF FACTUAL DETERMINATION FOR THE RECORD TO THAT EFFECT?

AND, TWO, BECAUSE I THINK EVEN THE COURT WILL ADMIT THAT THIS A CLOSE CALL, IN MY MIND THE STAFF PRETTY MUCH ADMITTED THE ISSUE AGAINST THEIR OWN INTEREST, WOULD THE COURT ENTERTAIN A STAY OF THE COURT'S ORDER SO THAT WE COULD SEEK A WRIT?

THE COURT: NO, BUT I WILL TELL YOU THAT MY REASONING SIMPLY IS I AM MINDFUL OF THE BROAD INVESTIGATIVE POWERS OF THE S.E.C. I AM AWARE OF THE BURDEN IN ORDER TO ISSUE AN INJUNCTION; THAT THE STAFF MUST SHOW LIKELIHOOD OF FUTURE VIOLATIONS. AND GIVEN THAT, MR. BRETZ, MY ORDER IS GOING TO BE ENTERED TODAY.

MR. BRETZ: VERY WELL. IF I MAY, THE LAW IS PRETTY CLEAR THAT THE LIKELIHOOD OF A CONTINUING VIOLATION HAS TO OF COURSE BE AGAINST THE PERSON WHO IS GOING TO BE THE OBJECT OF THE ACTION, AND THERE'S BEEN NO SHOWING WHATSOEVER THAT THE INFORMATION IN MR. ORTON'S FILE IS RELEVANT TO A CONTINUING VIOLATION BY PANWORLD.

THE COURT: WELL, THAT WILL BE DETERMINED - -

MR. BRETZ: - - PURE SPECULATION, WOULDN'T IT?

THE COURT: SURE. AND THAT WILL BE DETERMINED WHEN THEY SEE THAT, AND THOSE ARE MY FINDING AND THAT IS MY ORDER.

MR. BOYACK, AND PROBLEMS WITH THE LOGISTICS?

MR. BOYACK: I THINK THERE IS. TODAY IS THE 9TH, AND MONDAY WOULD BE THE 12TH, WHICH MEANS THE DOCUMENTS WOULD HAVE TO BE SENT ON MONDAY TO ARRIVE IN DENVER EVEN ON AN OVERNIGHT BASIS. SO I DO THINK THERE'S SOME LOGISTIC PROBLEMS. I CAN'T SPEAK FOR

MR. ORTON, AND I DON'T KNOW WHAT THE STATUS OF THOSE WORK PAPERS MIGHT BE. I KNOW AT TIMES THEY'RE QUITE VOLUMINOUS.

MS. HENDRICKSON: MY UNDERSTANDING FROM A REPRESENTATION BY MR. BRETZ IS THAT MR. ORTON HAS ALREADY COPIED THE WORK PAPERS.

THE COURT: THIS HAS BEEN PENDING, MR. BOYACK. YOU CAME IN, BUT I REVIEW OF THE FILE, THIS HAS BEEN AN ONGOING PURSUIT FOR MANY MONTHS. IT DOES NOT COME, IT WOULD APPEAR TO ME, AS A SURPRISE TO MR. ORTON THAT THOSE DOCUMENTS ARE BEING SOUGHT, AND THEREFORE I WOULD BELIEVE THAT MR. ORTON CERTAINLY HAS IDENTIFIED AND PREPARED THEM.

MR. BOYACK: WELL, I DO KNOW THAT HE WON'T BE BACK IN THE OFFICE UNTIL MONDAY, SO --

THE COURT: HE BEST BE NOTIFIED. IS THERE A PROBLEM WITH GIVING HIM A TWO DAY EXTENSION TO THE 15TH COUNSEL?

MS. HENDRIKSON: MY CONCERN IS THAT THE ACCOUNTANT WHO IS GOING TO TAKE THE TESTIMONY IS GOING TO BE OUT OF TOWN THE FOLLOWING WEEK, SO HE REALLY NEEDS AS MUCH OF NEXT WEEK TO REVIEW THE DOCUMENTS TO PREPARE FOR THE TESTIMONY ON THE 29TH.

THE COURT: OKAY, BUT LET'S GIVE HIM TWO DAYS. MR. BOYACK, THE DOCUMENTS THERE IN THE MORNING OF THE 15TH, ALL RIGHT?

MR. BOYACK: YES, YOUR HONOR.

THE COURT: OKAY. ANYTHING FURTHER?

MR. HENDRICKSON: NO, YOUR HONOR.

THE COURT: MR. BRETZ, ANYTHING?

MR. BRETZ: NO. THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, MR. BRETZ. AT THIS TIME I'M GOING TO SIGN THE ORDERS AGAINST - - FOR MR. GREER. AND I WOULD THINK, MR. BOYACK, YOU'LL NEED PROBABLY A COPY OF BOTH OF THEM.

MR. BOYACK: I BELIEVE I WILL, YES.

THE COURT: AND THEN WE CAN MAKE YOU A COPY.

MR. MELTON: YOUR HONOR, WE ALSO HAVE PENDING A MOTION FOR PROTECTIVE ORDER WITH RESPECT TO OUR FORMAL ORDER.

THE COURT: WE'RE GOING TO HAVE TO GET MR. BRETZ BACK ON THE PHONE FOR THAT.

MR. BOYACK: I DON'T KNOW THAT HE HAS AN OBJECTION TO IT, BUT I'D PREFER THAT HE BE CONSULTED.

MR. MELTON: WHEN YOU WERE SIGNING THE ORDERS, IT SURFACED IN MY MIND.

THE COURT: SO WHAT YOU'RE DOING IS YOU'RE ASKING THAT THE FORMAL ORDER NOT BE DISCLOSED?

MR. MELTON: THAT'S RIGHT. BY STATUTE IT'S A NONPUBLIC DOCUMENT. WE'RE PERMITTED TO DISCLOSE IT ONLY TO THE PERSONS FOR WHOM TESTIMONY IS BEING REQUESTED. BUT WHEN WE MADE IT PART OF THE RECORD OF THIS CASE SO THAT YOUR HONOR COULD REVIEW IT, TECHNICALLY WE'D LIKE THAT PROTECTION EXTENDED.

THE COURT: HAVE YOU GIVEN A COPY TO MR. BRETZ?

MR. MELTON: YES. A COPY WAS GIVEN TO MR. BRETZ IN HIS CAPACITY AS COUNSEL FOR MR. ORTON.

THE COURT: LET'S GET HIM BACK ON THE LINE THEN.

THE COURT: CAN YOU HEAR US NOW, MR. BRETZ?

MR. BRETZ: YES, YOUR HONOR.

THE COURT: I APOLOGIZE FOR NEGLECTING THIS, BUT AS YOU SAW, THE S.E.C. IS FURTHER MOVING FOR A PROTECTIVE ORDER FOR THE FORMAL ORDER, AND I GATHER - - AND I WANT TO VERIFY THAT YOU HAVE NO OPPOSITION TO THAT. IT WAS DISCLOSED TO YOU, BUT FOR A LIMITED PURPOSE, AND I HAVE HERE A PROPOSED ORDER

KEEPING THE FORMAL ORDER SEALED. HAVE YOU OBJECTION TO THAT?

MR. BRETZ: WE DO NOT.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH. SORRY TO DISTURB YOU.

MR. BRETZ: SURE.

THE COURT: ALL RIGHT.

MR. MELTON: THANK YOU, YOUR HONOR.

(HEARING CONCLUDED AT 9:30 A.M.)

* * *

CERTIFICATE OF REPORTER

I, RAYMOND P. FENLON, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH, DO HEREBY CERTIFY THAT I REPORTED, IN MY OFFICIAL CAPACITY, THE PROCEEDINGS HAD UPON THE HEARING IN THE CASE OF SECURITIES AND EXCHANGE COMMISSION VS. KEVIN ORTON, ET AL., CIVIL NO. 96-C-0041C, IN SAID COURT, ON THE 9TH DAY OF FEBRUARY, 1996.

I FURTHER CERTIFY THAT THE FOREGOING PAGES CONSTITUTE THE OFFICIAL TRANSCRIPT OF SAID PROCEEDINGS AS TAKEN FROM MY MACHINE SHORTHAND NOTES.

IN WITNESS WHEREOF, I HAVE HERETO SUBSCRIBED MY NAME THIS 17TH DAY OF APRIL, 1996.

/s/

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION
Applicant,
vs.
KEVIN ORTON and ROGER GREER
Respondents.

D.C. 96-CV-0041-C

AFFIDAVIT OF CARLEEN ACHUFF

EXECUTED JANUARY 10, 1996

Carleen H. Achuff, after having been duly sworn, states as follows:

1. I am a Senior Geologist with the Central Regional Office of the United States Securities and Exchange Commission (Commission), located in Denver, Colorado. I have been employed by the Commission since July 22, 1984.

2. On January 17, 1992, pursuant to Sections 8(e) and 19(b) of the Securities Act of 1933 [15 U.S.C. §§77h(e) and 77S(b)], and Section 21(a) of the Exchange Act of 1934 (15 U.S.C. §78u(a), the Commission issued an Order directing Private Investigation and Designating Officers to Take Testimony entitled In the Matter of PanWorld Minerals International, Inc. (Formal Order). The Formal Order

designates investigative officers and authorizes those officers to issue subpoenas and to compel the production of documents and the attendance of witnesses. The Formal Order has been supplemented to add additional officers. I am designated as an investigative officer on the Formal Order.

3. The Formal Order directs that a private investigation be conducted to determine whether, since in or about January 1990 to the present, PanWorld Minerals International, Inc. (PanWorld) and certain persons have engaged, are engaging, or are about to engage in violations of Sections 5(a) and (c), and 17(a) of the Securities Act, Sections 10(b) and 15(d) of the Exchange Act and Rules 10b-5, 12b-20, 15d-1 and 15d-13 thereunder.

4. The Formal Order specifically authorizes the Commission's staff to investigate whether certain persons have made misleading statements or omissions of material facts concerning, among other things, the financial condition, assets, operations and business prospects of PanWorld and whether the proper method of recording the value of the company's assets and stockholders' equity was used, and whether the offer, sale and delivery of PanWorld securities were made without a registration statement being in effect and without an exemption from registration being available.

5. In July 1995 I obtained a copy of PanWorld's annual report for the year ended December 31, 1994 which was filed with the Commission on Form 10-KSB on July 10, 1995. It contained financial statements that we audited by Orton & Company of Salt Lake City, Utah. I contacted Orton & Company by telephone and asked to whom I should direct a subpoena for Orton & Company's PanWorld audit documents. I was given the name of Kevin Orton (Orton), the owner of the company.

6. On July 14, 1995, acting as an officer designated by the Formal Order, I issued a subpoena duces tecum to Kevin Orton. This subpoena duces tecum sought, among other things, the original working papers prepared as part of the

PanWorld audit performed by Orton & Company. The subpoena duces tecum was personally served on Orton through certified mail to his business address and required his appearance and production of documents in Denver, Colorado on July 28, 1995. By letter accompanying the subpoena, I specified that the documents should be produced on July 28, 1995 and that testimony would be scheduled for a later date. See Exhibit 1.

7. Orton failed to produce the documents requested in the subpoena duces tecum on July 28, 1995. By letter dated July 31, 1995, Robert H. Bretz (Bretz), an attorney, advised an officer of the Commission that he represented Orton and that Orton had been travelling and was unable to produce the documents on the date requested. See Exhibit 2. Bretz has represented several other officers, directors, and consultants who have been subpoenaed to produce documents and provide testimony in this investigation. The officer granted an extension to August 8, 1995 for Orton's production of the subpoenaed documents. See Exhibit 3. On August 8, 1995, Bretz advised an officer of the Commission that Orton was not able to respond to the subpoena because of his travel schedule. See Exhibit 4. Despite the officer's request for a specific date when Orton would produce the documents. Bretz continued to delay. See Exhibits 5 and 6.

8. In response to the officer's demand on October 12, 1995 for a specific date for Orton's production of documents, Bretz refused to make the documents available pursuant to the subpoena, asserting that Orton did not believe the Commission's Formal Order could be used as a basis for the subpoena, but offered a voluntary inspection of the document. See Exhibits 7 and 8. By letter dated October 19, 1995, the Commission officer rejected Orton's assertion regarding the scope of the Formal Order. The officer requested that Bretz contact her to make specific plans for the Commission's staff to inspect and copy the documents and to schedule Orton's sworn testimony. See Exhibit 9. Bretz then proposed

delaying Orton's testimony until discovery during a proposed civil action being recommended to the Commission against PanWorld. This offer was rejected by the officer because it would delay the Commission's ability to determine through an investigation whether certain persons violated the federal securities laws. See Exhibit 10.

9. After repeated demands by the officer, Bretz agreed on October 28, 1995 to schedule Orton's testimony for December 1, 1995, which was later changed by mutual agreement to November 8, 1995 Bretz was advised the officer that he might have a conflict on the testimony date from a new judge who might want to commence a trial on November 27, 1995 on an unrelated matter in which Bretz was involved. See Exhibit 13. On November 22, 1995 Bretz advised the officer that because of a conflict with this trial it was "extremely doubtful" that Bretz would be available for the testimony that had been scheduled for November 30, 1995. Bretz further told the officer that he would see if Orton & Company wanted its counsel to review the documents prior to their production. See Exhibit 14. Despite an additional request to Bretz on November 28, 1995 for Orton's documents, no documents were ever produced. See Exhibit 15. Bretz advised the officers on November 28, 1995 that Orton would not appear for testimony pursuant to the subpoena because Bretz had a scheduling conflict. See Exhibit 16. To date Orton has not produced the documents nor appeared for testimony pursuant to the subpoena duces tecum issued to him on July 14, 1995.

10. From approximately May 1992 to date National Stock Transfer, Inc. has acted as the transfer agent for the securities of PanWorld. I and other officers of the Commission have obtained business records from National Stock Transfer, Inc. Based on my review of these records and my telephone conversations with Roger Greer (Greer), an officer of National Stock Transfer, Inc., it appears that Greer has been responsible for effecting many of the securities transaction for PanWorld, including issuing and transferring

transaction for PanWorld, including issuing and transferring stock certificates and removing restrictive legends from stock certificates.

11. On or about October 11, 1995, I telephoned Greer and told him that I intended to issue him a subpoena directing him to appear for testimony regarding PanWorld. Greer and I mutually agreed to schedule his testimony for the morning of October 17, 1995. On October 11, 1995, acting as an officer designated by the Formal Order, I issued a subpoena to Greer, which was personally served upon him through certified mail to his business address and required his appearance for testimony on October 17, 1995 in Salt Lake City, Utah. A copy of the subpoena also was sent to Greer by facsimile on October 11, 1995. See Exhibit 17.

12. Bretz contacted me by telephone on or about October 16, 1995 and advised me that he represented Greer for purposes of his testimony and that Greer was ill with the flu and would be unable to appear for testimony on October 17, 1995 in Salt Lake City, Utah as required by the subpoena. I was unable to reschedule Greer's testimony for later that week because of his continued illness. On October 19, 1995 I proposed additional dates for Greer's testimony during the following two weeks, which were unacceptable to Bretz, because he had conflicts with court dates. See Exhibit 19. On October 19, 1995, an officer requested that Bretz provide a definitive date for Greer's testimony by October 27, 1995. See Exhibit 10.

13. On October 28, 1995 Bretz proposed that Greer's testimony be scheduled for November 30, 1995 in Salt Lake City, Utah. See Exhibit 11. The proposed date was later changed to December 1, 1995 by mutual agreement. On November 8, 1995 Bretz advised me that he had a potential conflict and would be unable to appear for Greer's testimony. Bretz confirmed on November 28, 1995 that because of Bretz' scheduling conflict Greer would not appear for testimony on December 1, 1995. See Exhibit 16.

14. Greer has not appeared to date for testimony pursuant to the subpoena issued to him on October 11, 1995.

15. Bretz has made no subsequent attempt to reschedule dates for the testimonies of Orton and Greer and for the production of Orton's documents.

16. The documents and testimony sought by the Commission from Orton and Greer are relevant and material to the investigation because information received by the staff indicates that certain persons may have made misrepresentations in the financial statements of PanWorld and made offers and sales of securities for which no registration statement was filed with the Commission and for which no exemption from registration was available. Information obtained during the investigation indicates that Orton and Greer may have knowledge of these matters.

Dated: January 10, 1996

/s/
Carleen H. Achuff

Notary Acknowledgement

The above affidavit of Carleen H. Achuff was sworn to and signed before me this 10th day of January, 1996.

/s/
Diane V. Simmons
Notary Public

My commission expires on the 31st day of March 1999

APPENDIX F

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION
Petitioner - Appellee,
vs.
KEVIN ORTON and ROGER GREER
Respondents.

(D.C. 96-CV-0041-C)

SUBPOENA DUCES TECUM ISSUED BY UNITED STATES SECURITIES AND EXCHANGE COMMISSION TO KEVIN ORTON AND ORTON & COMPANY

EXECUTED JULY 14, 1995

To Kevin Orton
Orton & Company
357 South 200 East
Salt Lake City, UT 84101

At the instance of the United States Securities and Exchange Commission you are hereby required to appear before Carleen H. Achuff, Bert W. Mehrer, Charles H. Chaney, Officers, or any other designated officers of the Securities and Exchange Commission, at the Central Regional

Office, 1801 California Street, Suite 4800 in the City of Denver, Colorado 80202-2648 on the 28th day of July, 1995, at 10:30 o'clock a.m. of that day, to testify in the Matter of PanWorld Minerals International Inc. (D-1868) involving an order of private examination pursuant to Section 8(e), and a formal order of investigation pursuant to Section 20(a) of the Securities Act of 1933, and Section 21 (a) of the Exchange Act of 1934.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

(SEE ATTACHMENT)

Fail not at your peril.

In testimony whereof, the seal of the Securities and Exchange Commission is affixed hereto, and the undersigned, a member of said Securities and Exchange Commission, or an officer designated by it, has hereunto set his hand at Denver, Colorado this 14th day of July, 1995.

/s/

Carleen H. Achuff, Officer

NOTICE TO WITNESS - If claim is made for witness fee or milage, this subpoena should accompany voucher. Witness fees and mileage shall be paid by the party at whose instance the witness appears.

ATTACHMENT: SUPPLEMENTAL INFORMATION FOR PERSONS REQUESTED TO SUPPLY INFORMATION VOLUNTARILY OR DIRECTED TO SUPPLY INFORMATION PURSUANT TO A COMMISSION SUBPOENA

ATTACHMENT TO SUBPOENA DUCES TECUM,
page 1 of 2
TO: Orton & Company
DATE: July 14, 1997

A. Produce the following books, papers, and documents[1/] in the custody, possession, or control of

---

1/ For purposes of this subpoena, "document" is defined as:

All writing and graphic matter of any kind, including, but not limited to, the original; all interim drafts; and each copy of any writing that contains any interlineations, deletions, marginal notes, or which is otherwise non-conforming; and which shall include, but not

(continued...)

Orton & Company ("Orton") or to which has access that regard, refer to, or related to the audit of PanWorld Minerals International, Inc. ("PanWorld") for the fiscal year ended December 31, 1994. In this attachment, "10-KSB" refers to the PanWorld Form 10-KSB for the year ended December 31, 1994:

1. All of Orton's original accounting working papers generated as a result of work performed by Orton for or on behalf of PanWorld and any related entities or predecessor corporations, including, but not limited to all: accounting working papers; adjusting entries; journal entries; ledgers; journals; stockholder lists; stock transfer records; trial balances; financial statements, including interim and pro forma; property valuations, including reports, appraisals, correspondence, and other documents from experts; depreciation schedules; engagement letter; management letters; audit confirmations; business agreements; promissory notes; contracts; letters and other documents to or from predecessor, successor, and

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[1/] (...continued)
canceled check, analysis, deposit slip, telex, bill (including telephone and credit card bills), correspondence, receipt, transcript, photograph, sketch, chart, graph, diagram, diary, telephone log, appointment calendar, mailgram, accounting workpaper, report, computer print-out, memorandum, inter- or intra-office communication, minutes of meeting, invoice, and any tangible item of readable or visual material whether, printed, typed, handwritten, microfilmed, or recorded on tape, disc, or means of recording.

To the extent that any document specified herein is part of a more lengthy document, you are required to produce that more lengthy document in its entirety.

management letters; audit confirmations; business agreements; promissory notes; contracts; letters and other documents to or from predecessor, successor, and consulting auditors; correspondence and charts of accounts; and audit programs;

2. All documents related to services performed for PanWorld with respect to portions of the 10-KSB other than the audited financial statements, including, but not limited to, any of the forepart disclosure;

3. All original billing records on work performed for or on behalf of PanWorld and any related entities or predecessor corporations;

4. Documents sufficient to show the names and titles of the audit engagement partner, the concurring or review partner, and all other Orton employees or contractors who worked on the audit; and

5. All documents relied upon as the basis for the balance sheet valuation of "Property, Plant and Equipment" on page 3 of the audited financial statements to the 10-KSB.

B. Produce the following books, papers, and documents in Orton's custody, possession, or control or to which Orton has access that regard, refer to, or relate to any professional services performed by Orton for PanWorld:

1. All workpapers or other documents that regard, relate to, or refer to professional services that Orton performed for PanWorld in connection with PanWorld's quarterly financial statements for the quarters ended March 31, 1994, June 30, 1994, September 31, 1994, March 31, 1995, and June 30, 1995;

2. All workpapers or other documents that regard, relate to, or refer to consulting or other services performed by Orton for PanWorld from January 1, 1994 to the date of this subpoena; and

3. All inquiries directed by Orton to other CPA firms or to authoritative accounting organizations on accounting and auditing matters and the responses to such inquiries.

APPENDIX G

APPENDIX G

"SEALED DOCUMENT"

Lodged with Clerk ten (10) copies of S.E.C.'s Order Directing Private Investigation And Examination And Designating Officer To Take Testimony under seal.